27

Office Supreme Court, U. S.
FILED
MAY 18 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States:

MARCH TERM—1908.

No. ~~1908~~ 393

Frederick M. Steele and
The Fidelity & Deposit Company
of Baltimore, Maryland,
Complainants and Appellants

vs.

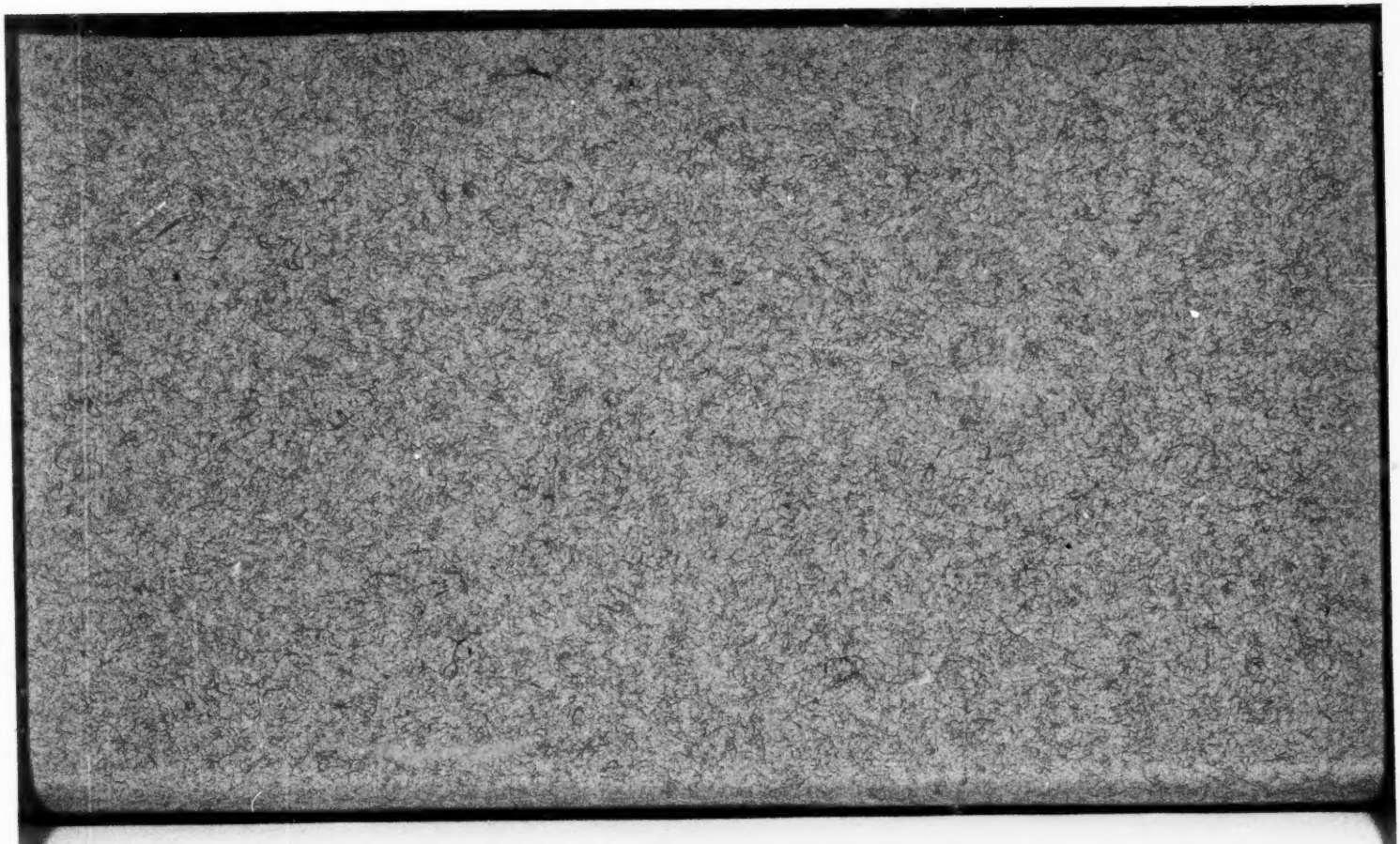
William Culver, Lester A. Taber,
Thomas J. Cavanaugh, Frank McKeye
guardian of the estate of William Culver
and The South Haven & Eastern Railroad
Comapny,
Defendants and Apellees.

In Error to the Circuit Court of the United States for the Western District of Michigan—Southern Division.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

THOS. J. CAVANAUGH,
L. A. TABOR,
Attorneys for Appellees.

FREE PRESS AND COURIER PRINTERS, PAW PAW, MICHIGAN.



Supreme Court of the United States:

MARCH TERM—1908.

No. ————

FREDERICK M. STEELE, et al,
Complainant and Appellants,

vs.

WILLIAM CULVER,
Defendants and Appellees.

TO MESSRS W. J. BARNARD,
Paw Paw, Michigan,
EDWARD MAHER and
ERNEST DALE OWEN,
Chicago, Illinois.
Solicitors for Appellants.

Please take notice that on the first day of June A. D. 1908, at the opening of court or as soon thereafter as Counsel can be heard the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motion in support thereof.

Dated May 9th, 1908.

L. A. TABOR,
T. J. CAVANAUGH,
Counsel for Appellees,

Supreme Court of the United States:

MARCH TERM—1908.

No. ————

Frederick M. Steele and
The Fidelity & Deposit Company
of Baltimore, Maryland,

Complainants and Appellants

vs.

William Culver, Lester A. Taber,
Thomas J. Cavanaugh, Frank McKeyes,
guardian of the estate of William Culver
and The South Haven & Eastern Railroad
Comapny,.

Defendants and Apellees.

In Error to the Circuit Court of the United States for the Western District of Michigan—Southern Division.

MOTION TO DISMISS OR AFFIRM.

Come now the Appellees William Culver, Lester A. Tabor, Thomas J. Cavanaugh and Frank McKeyes, guardian of the estate of William Culver, by L. A. Tabor and Thos. J. Cavanaugh, their attorneys, herein and move the Court to dismiss the appeal in the above entit'ed cause for want of jurisdiction because the judgment or decree from which the said appeal purports to

have been taken was made by the said Circuit Court in a case in which the said Court had absolutely no jurisdiction to take cognizance of the subject matter or of the parties.

(2) Because it appears upon the record herein and upon the face of the bill of complaint in this cause that the requisite diversity of citizenship required by the statue relating to the jurisdiction of the Circuit Court of the United States did not and does not exist.

(3) And the said Appllees by Counsel as aforesaid also move the Court to affirm the said judgment or decree from which the said appeal purports to have been taken.

(a) Because although the record in said cause may show that this Court has jurisdiction of the appeal, yet it does not show that it has jurisdiction of he parties, and it is manifest that **the said appeal was taken for delay only and that the question on which the jurisdiction depends is so frivolous as not to need further argument.**

(b) Because the record shows that an injunction was prayed for and granted by the said Circuit Court restraining the appellees from collecting a judgment in the State Court in violation of Section 720 of the United States Revised Statutes and said Court was therefore without jurisdicion.

This motion is based upon the files and records in said cause and certain proceedings had and taken therein, to-wit:

1. **A Bill of Complaint alleged that**

(a) Frederick M. Steele and the Fidelity & Deposit Company of Maryland, complainants, bring their bill and comp'ain of William Culver, Lester A. Tabor, Thomas J. Cavanaugh, Frank M. McKeyes, guardian of the estate of William Culver, and The South Haven & Eastern Railroad Company made defendants herein and respectfully represent that the comp'ainant Frederick M. Steele is a citizen of the state of Illinois and a resident of the city of Chicago in said state, that the complainan, The Fideliy & Deposit Company of Maryland, is a corporation organized,, created and existing under the laws of the state of Maryland and a citizen of said state of Maryland, and that said defendants William Culver, Lester A. Tabor, Thomas J. Cavanaugh and Frank M. McKeyes, Guardian, are all citizens of the state of Michigan and of the Western District thereof and are residents therein, and that The South Haven & Eastern Rail-

road Company is a corporation organized and existing under the laws of the state of Michigan.

(b) That heretofore to-wit, on the 16th day of February, 1903, the defendants William Culver brought his certain suit at law in the Circuit Court of Van Buren County, in the state of Michigan, against the defendant, the South Haven & Eastern Railroad Company, claiming in said suit and alleging in its pleadings, among other things, that he received personal injuries while in the employment of said Railroad company by the fault and negligence of said company.

(c) That in such suit the defendant Lester A. Tabor and Thomas J. Cavanaugh appeared, as attorneys of record for said Culver, and so remained actively conducting the affairs of the proceedings in such suit and subsequent proceedings herein set out until the termination thereof.

(d) That on to-wit, the 3rd day of February, 1903, a trial was had in said suit of Culver against said Railroad Company before a jury, that on such trial witnesses were introduced on behalf of the plaintiff and on behalf of the defendant, and that the jury thereupon rendered a verdict in favor of the plaintiff Culver against the defendant, the said Railroad Company, for the sum of nineteen thousand two hundred dollars ($19,200.00), and that judgment was entered on such verdict. That an appeal was taken from said judgment to the Supreme Court of the state of Michigan and that it was there affirmed.

(e) That on the appeal taken by said railroad company as aforesaid The Fidelity & Deposit Company of Maryland became and was surety and is still surety on the bond of said Railroad Company given to procure and perfect said appeal in the sum of $22,000.00, that said appeal bond is in the usual form and is conditioned as follows, to-wit:

"Now therefore the condition of this obligation is such that if the said South Haven & Eastern Railroad Company shall pay the said judgment and costs if the same is not reversed and if a writ of error is issued in said cause the said South Haven & Eastern Railroad Company will prosecute its writ of error to effect and will pay and satisfy such judgment as shall be rendered against it thereon, then this obligation to be void, otherwise to remain in full force and effect."

(f) That afterwards, to-wit: On the 9th day of January, 1907, the said William Culver by the said L. A. Tabor and T. J.

Cavanaugh, his attorneys, commenced a certain action at law against the said Fidelity & Deposit Company of Maryland upon said bond and that such proceedings there therein had that final judgment was rendered in favor of said Culver and against the said The Fidelity & Deposit Company of Maryland for the sum of $21,830.75 and his costs therein. That to procure the said The Fidelity & Deposit Company of Maryland to execute and to enter into said bond it became and was necessary that the said Frederick M. Steele should execute to the said Surety Company a certain contract in writing undertaking to save the said surety company harmless in case of any liability arising upon such bond and that the said Steele is still bound and liable upon such contract and undertaking.

That if the said Surety Company shall be obliged to pay the amount of said judgment that the said Steele will then be liable to pay the amount thereof to said Surety Company and that the said Surety Company and said Steele, the complainants herein, are the persons who will ultimately be obliged to pay the amount of said judgment and costs, unless the collection of the same shall be enjoined as herein prayed and that they are the real parties in interest in this suit.

(g) That said Railroad Company, the defendant in the said suit of Culver against the same, and who entered into such bond with said Surety Company, is now operated in connection with a large trunk line of railroad and that said judgment cannot, nor can any part of it, be collected from said railroad company, that the same has been merged into and taken into the system of a large and extended railroad company.

(h) That the said Steele heretofore and as part of the transaction of the sale of said Railroad Company's property and securities to said larger railroad company entered into a certain bond in the penal sum of Twenty-Five Thousand Dollars and that by the terms of said bond the said Steele became liable and was and is liable to pay any judgment that might be due said Culver against said South Haven & Eastern Railroad Company, and that if the collection of said judgment is not enjoined by this Court it will ultimately have to be paid by said Steele."

(i) The Bill further alleges that the original judgment procured against the South Haven & Eastern Railroad Company was procured by conspiracy, false and perjured testimony, and an injunction is prayed that the appellees herein named and all

of the defendants in said bill of complaint EXCEPT THE SOUTH HAVEN & EASTERN RAILROAD COMPANY, be forever enjoined and inhibited from collecting or attempting to collect either of said judgments.

DEMURRER.

II.

A Demurrer to said bill of Complaint, alleging,

(a) That it appears in and by said bill of complaint that the judgment which it is now sought to restrain was obtained upon a cause of action only cognizable at law and in a Court which had sole and exclusive jurisdiction of the parties and subject matter.

(b) That it appears upon complainants' own showing in and by said bill of complaint that they are not entitled to the relief prayed against these defendants or any or either of them.

(c) That it appears from the said bill of complaint that this Court has no jurisdiction to hear and determine the matters alleged to be in controversy.

(d) That the said bill of complaint is wholly without equity.

(e) That the state Courts where said judgment so mentioned and described in the bill of complaint were rendered, have full power and authority to correct any and all errors and to grant all such relief as has been set forth and prayed for in said bill of complaint if there be any merit in the complainants' contentions.

(f) That it appears in and by said bill of complaint and the facts and circumstances therein set forth that one of the defendants, to-wit: The South Haven & Eastern Railroad Company, a railroad corporation organized and existing under the laws of the state of Michigan, and as such a citizen of the state of Michigan, is the real party complainant and could not legally or equitably be made a defendant herein.

(g) That the said complainants have not shown in and by said bill of complaint that they have such a right or interest in the subject matter therein mentioned as would entitle them to the relief prayed.

OPINION.

III.

An Opinion filed by the Circuit Judge, as follows:

The complainant Steele is a citizen of Illinois. The complainant The Fidelity & Deposit Company is a citizen of Maryland. The defendants are all citizens of Michigan, the defendant Railway Company being a Michigan corporation.

The interests of the Railways Company are on the same side of the controversy as those of complainants. For the purpose of determining jurisdiction the Railway Company must therefore be aligned with the complainants. Pittsburg C. & St. L. Ry. Co. vs. Baltimore & Chicago Ry. Co., 61 Fed. Rep. 705; 10 C. C. A. 20, Removal cases 100 U. S. 457, Railroad Company vs. Ketchum, 101 U. S. 289. If so aligned this Court has no jurisdiction.

Unless therefore it can be held that the Railway Company is not a necessary defendant and complainant be permitted to dismiss as to the Railway Company the bill cannot be sustained in this Court. If, however, the railway company is not an indispensible party the complainants should be permitted to dismiss as to that defendant for the purpose of saving jurisdiction. Sioux City vs. Trust Co., 82 Fed. Rep. 124, 128. 27 C. C. A. 73. An indispensible party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the Court cannot be made without affecting his intrests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. This test is applicable in determining jurisdiction by reason of diverse citizenship. General Equity Rule No. 47 does not change this rule. Shields vs. Barrow, 17 How. 129, 141; California vs. Pacific R. R. Co., 157 U. S. 229, 249; Minnesota vs. Northern Securities Co., 184 U. S. 199, 235. And where a party is so related to the subject matter of a suit in equity that his rights must unavoidably be passed on by the Court in reaching a final decree he is a necessary party. Consolidated Water Co. vs. Babcock, 76 Fed. Rep. 243, 248.

Unless therefore the interests of the railway company in the subject matter, can be said to be taken away by reason of the specific allegations of the bill hereinafter mentioned, it is

manifestly interested in the subject matter of the controversy. A judgment has been obtained against it. If the bill is sustained it is benefited by the decision. If the bill is dismissed it, if not a party, would not be bound by the decision, and the defendants here would be compelled to try the case over again as to the Railway Company. The complainants can be given no relief without a decision directly upon the rights of the Railway Company, for it is only because of the alleged fraud against the Railway Company that this Court can seriously be asked to restrain the collection of the judgment in question.

The bill alleges, however, that the Fidelity & Deposit Company is surety upon the bond given by the Railway Company on appeal to the Supreme Court from the judgment complained of; that final judgment has been rendered against The Fidelity & Deposit Company upon that bond; that complainant Steele is the indemnitor of the Fidelity Company with regard to that liability, that complainants are thus the persons ultimately liable to pay the judgment and costs, and are the real parties in interest; that the judgment cannot be collected in whole or in part from the Railway Company; that by the agreement between Complainant Steele and the Railway Company the former as against the latter is liable to pay the judgment, and that the Railway Company is not liable over to complainant, Steele.

The reason given for the alleged lack of collectibility on the part of the Railway Company is that it is now operated in connection with a large trunk line of railroad, and has been merged into the system of a large and extended railroad company. The conclusion that the Railway Company is insolvent does not necessarily follow from the fact that it has been taken into a larger system. Indeed the allegation that Complainant Steele gave a bond to indemnify the "larger company" from liability on account of the judgment in question suggests the liability of the "larger railroad company" for the payment of the judgment. The fact remains that injunction is asked to restrain the collection of the judgment against the railroad company. But if the bill be construed as alleging a present uncollectibility on the part of the Railroad Company and if it be conceded that such present uncollectibility would be a good ground for dispensing with it as a party (a proposition which is doubtful. Consolidated Water Co. vs. Babcock, 76 Fed. Rep. 243, 250 and following) it by no means follows that the railroad company will continue

in an insolvent condition.

In my opinion it appears by the face of the bill that the railway company has such an interest in the subject matter of the controversy that a final decree between the parties before the Court cannot be made without affecting its interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience, and that the railroad company is so related to the subject matter of this suit that its rights must unavoidably be passed upon by the Court in reaching a final decree. The bill cannot therefore in my judgment, be maintained without retaining the Railway Company as a party; and as so retaining it in its proper alignment with complainants, would defeat jurisdiction, the bill cannot be sustained.

The fifth ground of demurrer is evidently intended to raise this question of diverse citizenship upon proper alignment with the Railway Company. As it is the duty of the Court to dismiss a bill whenever lack of jurisdiction appears it is not material to determine whether the demurrer is sufficiently artificial to exactly reach the question. An order will be entered denying complainants' application to dismiss as to the Railway Company and dismissing the bill for lack of jurisdiction.

In case complainant shall wish to review this decision I shall be inclined to preserve the status of injunction pending appeal, as provided by Equity Rule No. 93 (See Hovey vs. McDonald, 109 U. S. 150). The remaining causes of demurrer as well as the plea may be regarded as argued and submitted. The conclusion reached makes decision thereon unnecessary for the present at least.

LOYAL E. KNAPPEN,
U. S. District Judge.

Dated February 4, 1908.

DECREE.

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

In Equity.

Frederick M. Steele, et als.,
Complainants.

vs.

William Culver, et als.,
Defendants.

This cause having come on to be heard upon the order requiring the defendants to show cause before this Court why they should not be restrained as prayed in said bill of complaint filed herein, and counsel for the respective parties having been fully heard thereon, it appearing to the Court from an inspection of said bill of complaint that this court has no jurisdiction over said cause as a Court of the United States for lack of the diversity of citizenship required by the statute relating to the jurisdiction of this Court as a Court of the United States, it is **Ordered, Adjudged and Decreed, that said bill of complaint be** and is hereby dismissed for lack of jurisdiction in said Court over said cause as aforesaid.

Simultaneously with the making and entering of this decree an order is made and entered restoring and continuing in force the restraining order heretofore made herein, pending the hearing and determination of the appeal from this decree dismissing said bill of complaint, and upon terms and conditions stated in said order.

Approved for entry,

Dated April ————————, 1908.

LOYAL E. KNAPPEN,
U. S. District Judge.

ORDER.

United States of America,
Western District of Michigan,
Southern Division.
ss:

The foregoing claim of appeal is hereby allowed this 2nd day of May, A. D. 1908, and it is hereby certified by the Court that the decree dismissing the Complainants' bill of complaint in this cause from which appeal is now taken to the Supreme Court of the United States, was based solely on the ground that upon the record herein and upon the face of the bill of complaint in said cause it appeared that the requisite diversity of citizenship required by the statute relating to the jurisdiction of said Circuit Court as a Court of the United States, did not exist, and that therefore this Court as a Court of the United States had no jurisdiction in the premises; and that this appeal is allowed solely upon said question of jurisdiction.

LOYAL E. KNAPPEN,
U. S. District Judge.

L. A. TABOR and
THOMAS J. CAVANAUGH,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES,

MARCH TERM, 1908.

No. ————

Frederick M. Steele and
The Fidelity & Deposit
Company of Baltimore, Maryland,
Complainants and Appellants,

vs.

William Culver, Lester A. Tabor,
Thomas J. Cavanaugh, Frank M. McKeyes,
Guardian of the estate of William Culver,
and The South Haven & Eastern Railroad Company,
Defendants and Appellees.

In error to the Circuit Court of the United States for the Western District of Michigan, Southern Division.

BRIEF FOR APPELLEES on Motion to Dismiss or Affirm.

It appears from the bill in this case that William Culver, one of the defendants, commenced suit in the State Courts against the South Haven & Eastern Railroad Company, a Michigan corporation, another of the defendants, to recover damages for personal injuries, that the suit was tried in Van Buren Co. Circuit Court and that Culver recovered a verdict which was affirmed by the Michigan Supreme Court upon appeal. At the time of the commencement of this suit and at the time the bill in this case was filed both Culver and The South Haven & Eastern Railroad Company were citizens of the state of Michigan. The Complainant Steele was not a party to that litigation, and so far as the bill shows had no interest therein. The Complainant, The Fidelity & Deposit Company of Maryland,

was not a party to that suit, and in no way interested therein. It became surety for the South Haven & Eastern Railroad Company upon appeal to the Michigan Supreme Court at the request of Mr. Steele and was indemnified by him. Judgment was afterwards procured by Culver against The Fidelity & Deposit Company in the Circuit Court and affirmed by the Michigan Supreme Court.

There is no allegation in the bill that either Steele or the Fidelity Company is a stock holder or officer of the South Haven & Eastern Railroad Company or ever were such, or that The South Haven & Eastern Railroad Company through its duly authorized officers or otherwise has refused or neglected to act in its own behalf, or that there was any collusion or agreement between the South Haven & Eastern Railroad Company, and the other defendants to procure or enforce the judgment which it is sought by this proceeding to enjoin or that the South Haven & Eastern Railroad Company was in any manner prevented from making any legal defense in the state Courts.

ARGUMENT.

The appellants are seeking an extraordinary remedy in a most extraordinary manner. The judgment, the collection of which it is sought to enjoin by this proceeding, was between two parties over whom the Courts of the state of Michigan had exclusive jurisdiction, to-wit: William Culver and The South Haven & Eastern Railway Company, being two of the present defendants, so made by the complainants in this case. The mere making of a party either a complainant or defendant does not of itself give the Court jurisdiction on this question.

If, from the bill as a whole, it appears and the Court can and does discover that one party is made defendant who ought to be made complainant or vice versa, and that when the parties are properly placed or marshalled, that diverse citizenship required by the Constitution to give jurisdiction does not exist, then the case cannot be retained.

From the statement of facts appearing in this motion taken from the record in this case, the first irresistible conclusion the mind must reach is that the defendant, The South Haven &

Eastern Railroad Company, should be the complainant in the case—in fact it is the party naturally burdened with the responsibility of applying for relief.

It is not made a complainant in express terms.

There is no reason set forth in the bill why it was not made the sole complainant or at least one of the complainants.

There is no reason assigned why it is made a defendant.

No relief is asked against it.

In fact, relief is asked for it.

So we say—while it appears as a defendant in reality, it is a complainant, therefore there would be no diversity of citizenship and no jurisdiction to entertain the bill.

This conclusion is well supported by the authorities cited by the District Judge in his opinion, and we direct especial attention to Doctor vs. Harrington, 196 U. S. 579.

The case of City of Dawson vs. Columbia Avenue Savings Fund Safe Deposit, Title & Trust Co., 197 U. S. 178, is decisive of the question of jurisdiction in this case.

Mr. Justice Holmes delivered the opinion of the Court in the course of which he says:

> "The Water Works Company is admitted to have been a necessary party ,and it like the defendant city was a Georgian Corporation. It was made a defendant, but the Court can look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant solely for reopening in the United States Court a controversy which had been decided against it in the Courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations in the bill; on the contrary it appears from those allegations that the water works company insisted on its contract with the city and did everything in its power to carry the contract out. No difference or collision of interests or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay which we do not intimate, still when the arrangement is merely a contrivance between friends for the purpose of funding

a jurisdiction which otherwise would not exist, the device should not be allowed to succeed."

In Groel vs. United Electric Co. of N. J. et al, 132 Fed. 252, the question received very thorough consideration. The authorities are fully reviewed, collated and discussed.

In that case a stockholder brought suit against a corporation in which he was interested and others. In the course of the opinion the Court said (Page 254):

> "The New Jersey Company in the case now under consideration cannot be considered a merely formal or nominal party. It is a necessary and indespensible party. The case could not proceed without it. The complainant seeks relief in its behalf because it will not seek it for itself, as it will not voluntarily act as a complainant the practice in equity requires that it shall be brought in as a party defendant. It follows that in determining the question of jurisdiction its citizenship cannot be ignored, but the mere fact that it stands as a defendant on the face of the pleadings does not fix its status in the controversy. That is fixed by its real relation to the controversy."

In McClellan vs. McKane et al, 154 Fed. 164, it was held that in a suit b ya stockholder the corporation was an indepensible party.

In Dodge vs. Wolsey, 18 How. 340, a stockholder brought suit where the corporation refused. The Court said:

> "The relief asked in on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong in case the shareholders were unsuccessful to allow the corporation to renew the litigation in another suit involving precisely the same subject matter. To avoid such a result a Court of equity will not take cognizance of a bill brought to settle the question in which the corporation is the essential party in interest unless it is made a party to the litigation."

If a stockholder cannot maintain a suit in the interest of his corporation without making the company or corporation an indespensible party, then most certainly in the case under con-

sideration the complainants in this case cannot maintain this suit unless the defendant railroad company is retained as a party.

In the present case the South Haven & Eastern Railroad Company is a necessary party and it, like the other defendants, is a resident of Michigan. While it is made a defendant "The Court" in the language of Mr. Justice Holmes "Will look beyond the pleadings and arrange the parties according to their sides in the dispute."

"When that is done it is obvious that the South Haven & Eastern Railroad Company is on the Complainant's side. The fraud alleged in the bill of complaint is said to have been committed against it and not against the Complainants or either of them. Its interests are not antagonistic to the Complainants. In fact the complainants and the defendant Railroad Company are friends. No difference or collision of interests or action is alleged or even suggested and relief is asked in behalf of the defendant Railroad Company. It would seem then that the arrangement of the parties in this bill is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist and the device ought not to be allowed to succeed.

It is the corporation as a corporation which has to determine whether it will make anything that is a wrong to the corporation a subject matter of litigation or whether it will take steps to prevent the wrong from being done.

Hawes vs. Oak'and, 104 U. S. 450.

Corbus vs. Alaska Mining Co., 187 U. S. 455.

Until it refuses to redress the wrong no person incidentally or otherwise injured or benefited, not even a stockholder, can maintain a suit.

In the present case the Railroad Company is very deeply interested in the litigation. If the judgment is set aside or enjoined it is benefited to that extent. It is a citizen of Michigan.

It can proceed in its own behalf now or if it refuses to act an interested stockholder might act for it in the State Courts. It is therefore clear that there is no diversity of citizenship, that the Circuit Court had no jurisdiction whatever and having had no jurisdiction there is no jurisdiction to entertain this appeal and the motion to dismiss or affirm ought to be granted.

Subdivision 5 of Rule 6 provides, "There may be united with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

In the present case it clearly appears from an examination of the record that the court is without jurisdiction. The District Judge so found and there can be no question of such finding. If the complainants are aggrieved as alleged in the bill of complaint, it is the grievance of one of the defendants so made, to-wit: The South Haven & Eastern Railroad Compay. This defendant has never refused to act in its own behalf—has never conspired against the complainants or entered into any combination with the defendants to aid in procuring a judgement against itself. On the contrary it has litigated every step through all the courts of the state of Michigan and if there is any merit in the present claim it can and will seek redress in the State Courts where this litigation rightfully belongs.

The making of it a defendant in this proceeding as is apparent, was a mere makeshift, a pretense to give this Court jurisdiction in order that this litigation might be further delayed.

For this reason we most respectfully ask that the question of jurisdiction be disposed of upon this motion. It has often been done by this Court.

Chanute vs. Wilbur F. Trader, 132 U. S. 210.

Aspen Mining & Smelting Co., vs. Billings et al., 150 U. S. 31.

In White vs. Cook, 99 U. S. 607 Mr. Chief Justice Waite speaking for the Court in a case where the appeal was frivolous and the District Court without jurisdiction said " Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages and we think this a proper case in which to say that hereafter more attention will be given to the subject and the rule enforced both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The record shows that the original litigation out of which this suit grows was commenced in February 1903, that a judgment was procured, that the judgment was affirmed by the State Court, that the Surety Company was sued, that judgment was procured against it, that such judgment was affirmed by the Michigan Supreme Court, that the litigation has been pending upwards of five years, that the judgments have not been paid and now as a pretense the defendant, The South Haven & Eastern Railroad Company by and through Frederick M. Steele, a resident of the city of Chicago, and the Finelity & Deposit Company a resident of Maryland, seeks the aid of the Federal Court as a means of further delay and in order to give a pretense of jurisdiction has itself made a defendant so that on the face of the bill the Court would appear to have jurisdiction on the question of diversity of citizenship.

So we say if there ever was a case where the language of Chief Justice Wait should be applied it is the present one and we most respectfully ask this Court to affirm the decree of the District Court and to award the defendant Culver damages.

All of which is respectfully submitted,

L. A. TABOR and
THOMAS J. CAVANAUGH,
Attorneys for Appellees.

In the Supreme Court of the United Sates:

OCTOBER TERM 1908. NO. 393.

Frederick M. Steele, and The Fidelity and Deposit Company of Baltimore, Maryland
Complainants and Appellants,

VS.

William Culver, Lester A. Tabor, Thomas J. Cavanaugh, Frank McKeyes Guardian of the Estate of William Culver, and The South Haven & Eastern R. R. Co.,
Defendants and Appellees.

Appeal from the Circuit Court of the United States for the Western District of Michigan, Southern Division, Sixth Circuit, Certified to this Court on a Decree Dismissing Complainant's Bill, because there was not the Necessary Diversity of Citizenship to Give the Circuit Court Jurisdiction.

Appellees' Reply to Appellant's Motion and Brief.

Appellee's Reply to Appellants' Motion to File Brief and Argument.

The motion to dismiss or affirm was properly noticed so that it might be and was submitted to this court on June first last. Appellants now file a motion to be permitted to file a brief in opposition thereto.

This motion is supported by an affidavit which does not state facts sufficient to excuse appellants' delay in this case.

An examination of the brief proposed to be filed shows that counsel for appellants have gone ontside of the record in arguing facts on the question of jurisdiction.

The undisputed facts supported by the record tend to the single conclusion that the only object of appellants is to cause delay in the collection of the judgement obtained by appellee William Culver. William Culver, one of the defendants and appellees, obtained a final judgment against the South Haven & Eastern Railroad Company on Febtuary 3d, 1905, more than three and a half years ago. Mr. Frederick M. Steele, one of the complainants and appellants, was neither a party to that sutt nor in any manner whatever interested in it. Nor, as appears by the record herein, was he in any way interested in the railroad company. It does not appear that he was either a stockholder or officer. He was an entire stranger to both the suit, and the railroad company, and had no interest of any kind in either. In order to appeal from the judgment so obtained against the railroad company, Mr. Steele requested and caused the Fidelity and Deposit Company, the other complainant and appellant, to execute an appeal bond by the terms of which it contracted to pay the judgment if it was affirmed by the supreme court. The judgment was duly affirmed. See

Culver vs. The South Haven & Eistern Railroad Company, 144 Mich., 254. 257.

The judgment not being paid, Mr. Culver sued the Fidelity & Deposit Company on its bond and obtained a judgment in the circuit court of Van Buren county, Michigan, for $21,83>.75. This judgment was duly affirmed by the Supreme court of Michigan. See

Culver vs. Fidelity & Deposit Co., 149 Mich, 630.

After this last judgment was so affirmed, as is shown by the answer to the btll herein, a motion was made in the Circuit Coart for Van Buren county, Michigan, at the request and instigation of Mr. Steele, praying leave to file a motion for a new trial in the case of Culver against the railroad Co., which motion was based upon the same charges and allegations as those in the Bill herein; the motion was denied. See motion set out in the answer to the Bill herein.

After this motion was denied an application was made to this Court, of which this Court will take judicial notice, for a writ of error to the Supreme Court of the State of Michigan, which application was denied by Mr. Justice Harlan, After such denial Mr. Steele caused the Bill herein to be filed, and, in order to claim authority as complainant in filing the bill, alleged that previous to the trial of the

case of Culver against the railroad company he had executed a bond to a trunk line of railroad, [not named] to pay any judgment Culver might obtain against the South Haven & Eastern Railroad Company. Culver was not a party to that bond, if any such was given, and knew nothing of it.

All proceedings by Culver against the railroad company, and also against the Fidelity and D posit Co., on its bond, were had in the State court and, only after every effort in the State courts had failed to further delay and prevent payment of the judgment, did Mr. Steele resort to the Federal court, where the bill was filed in this cause on December 9th, 1907, on which date an injunction was issued restraining Culver from proceeding further to collect either of his judgments. In filing this bill the South Haven & Eastern Railroad Company, the company against which Culver obtained his judgment was made a defendant, but there is not a single allegation in the bill tending to show why it was m ide a defendant instea l of a complainant. The relief sought is prim rily and solely for the b nefit of the railroad company because it absolutely relieves it from any and all liability.

The Circuit Court dismissed the bill on the ground that there was not the necessary diversity of citizenship to confer jurisdiction, and because the railroad company should have been made a complainant instead of a defendant. An opinion was filed on February 4th, 1908 and the appeal taken on May 2d. On May 9th, seven days after the appeal was taken, motion was filed and served on appellant's attorneys to dismiss and affirm. A copy of such motion, as the proof on file shows, was served on the attorneys for appellants three full weeks before the time for hearing and no reason exists why their brief was not prepared and filed on or before such day of hearing, and we insist it would be, not only inequitable, but extremely unjust to allow a brief to be filed after waiting four months after notice of the motion.

On December 9th, the day the bill was filed, and the day on which the injunction issued, the Fidelity & Deposit Company, one of the complainants, wrote a letter which is in the answer, and to which we call attention, as follows:

"Fdelity & Deposit Company of Maryland.
"Charles R. Miller, Vice President,"

Baltimore, December 9th, 1907. 84,935.

South Haven & Eastern Railroad Company."
"L. A. Tabor, Esq , Lawton, Michigan."

"Dear Sir:—Your letter of the sixth instant in regard to the Culver judgment received. Your telegram of the fifth instant was not answered until the sixth, as I desired to hear from Chicago before replying. As you know the defense of this action is not con-

trolled by our company and by reason of certain circumstances it is necessary for us to permit the attorneys for the railroad company to exhaust every possible legal remedy before taking up the case ourselves for settlement. Very truly yours, Charles R. Miller, Vice President."

The letter shows that on the day it was written the Fidelity & Deposit Company was *wiring the attorneys for the Railroad Company* to learn whether or not it should pay the judgment, and on the same day its agent and representative in Chicago was signing the bill in this cause with Mr. Steele and itself as complainants and making the railroad company a defendant, in order to claim jurisdiction in the Federal court. It looks very much like fraud and conspiracy to prevent Culver from collecting his judgment, and it is certainly a fraud on this court.

Mr. Steele gave his bond to a trunk line of railroad. Mr. Culver was not a party to that bond. Neither was Mr. Steele ever liable to Culver either personally or on that bond.

Therefore Mr. Steele never had authority to cause Mr. Culver to be restrained from collecting a judgment either against the Fidelity company or the South Haven & Eastern Railroad Company.

The circumstance that sometimes parties to an action have caused undue delay in the collection of judgments is receiving widespread attention, and is causing much comment by not only the public press but in many instances by the judiciary, but this is the first instance in which our attention has been called where a stranger to the action has been allowed to delay payment for more than three and a half years, and after failing to longer delay collection in the State Courts where the action was brought and pending and where sole jurisdiction existed, go into Federal Court and cause delay for months before the matter can be brought to the attention of the court by appealing to the court of last resort. Under such circumstances the expense in protecting his rights frequently amounts to a large portion of the judgment and thereby prevents a litigant from receiving the benefits of his judgment legally obtained and sustained by the highest court of the jurisdiction where brought

We therefore insist that the appellants have shown no diligence on this motion and no further delay should be awarded them.

II.

If, however, this court should receive appellant's brief, inasmuch as the questions involved in the case are argued upon their merits we desire to call attention to a few additional authorities which bear out appellee's contention as set forth in his motion and presented in his original brief.

The appeal herein was brought in accordance with the well considered opinion of this court in

United States vs. Jahn, 155 U. S., 109.

Under the facts as above set out, we feel that the motion to dismiss and affirm is well taken because it cannot be questioned that delay has been and is now the only object sought, and that not by a party to the suit in which Culver obtained his judgment against the railroad company, but by an entire stranger, who never had any interest of any kind therein.

We call attention to an opinion by this court where a motion to dismiss was grantod although the facts showing delay were much weaker than in the case at bar. An appeal was taken to test jurisdiction and a motion to dismiss and affirm entered, and in passing on t this court, speaking through Mr. Justice Blatchford, said:

"But, although this court has jurisdiction of this writ of error, we are of opinion that, under clause 5 of rule 6 of this court, the judgment of the Circuit Court of Appeals must be affirmed, on the ground that there was color for the motion to dismiss, and that the writ was taken for delay only."

Northern Pacific Railroad Co., vs. Amato, 144 U. S, 465, 473.

III.

The case of Culver against the railroad company could not have been commenced in the Federal court, nor could it have been transferred from the State court to the Federal court. The State court had sole and exclusive jurisdiction, and under the authority of this court, that jurisdiction continued until the judgment was finally and fully collected and discharged.

Harkrader vs, Wadley, 172 U. S. 148.

Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.

In re Chetwood, Petioner, 165 U. S. 443.

The state court having had sole and exclusive jurisdiction of the parties as well as the subject matter in the suit by Culver against the railroad company, and the rule being fully settled holding that under such circumstances the state court will retain exclusive jurisdiction until the judgment is fully paid and discharged, we insist that section 720 of the Revised Statutes applies with full force and that the in-

junction restraining Culver from collecting his judgment is without authority and void. See

Peck vs. Jenness, 7 Howard, 612, 625.
Watson vs. Jones 13 Wallace, 679, 719.
Haines vs. Carpenter, 91 U. S. 254, 257.
United States vs. Parkhurst-Davis Co., 176 U. S, 317, 319.

In passing on this question and referring to Haines vs. Carpenter, 91 U. S. 364, 257, in the last case cited, this court speaking through Mr. Justice Brewer, said:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the Federal courts are expressly prohibited from doing, By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. Without stopping to consider any other questions presented by counsel this is sufficient to sustain the ruling of the circuit court, and the decree is affirmed."

Opinion written by Mr. Justice Brewer, in U. S. vs. Parkhurst-Davis Co., 176 U. S., on page 320.

We therefore again respectfully submit that the decree of the District Court ought to be affirmed and the appeal dismissed.

LESTER A. TABOR,
THOMAS J. CAVANAUGH,
Attorneys for Appellees.

Business Address respectively,
Lawton, Michigan,
Paw Paw, Michigan.

Office Supreme Court, U. S.
FILED
JUN 29 1908
JAMES H. McKENNEY,
Clerk.

C-4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908.

No. 303

FREDERICK M. STRELE, for the FIDELITY & DEPOSIT COMPANY OF BALTIMORE, MARYLAND,

Complainant and Appellant,

vs.

WILLIAM CULVER, LESTER A. SWEET, THOMAS J. CAVANAUGH, FRANK HARRIS, Executors of the Estate of William Culver and the SOUTH HAVEN & EASTERN RAILROAD COMPANY,

Defendants and Appellees.

Appeal from Circuit Court of the United States for the Western District of Michigan, Southern Division.

Appellants' Brief in Answer to Motion to Dismiss Appeal.

EDWARD MAYER,

Counsel for Appellant.

ELBERT DALE OWEN,

Of Counsel.

IN THE

Supreme Court of the United States

JUNE TERM, A. D. 1908.

No.

FREDERICK M. STEELE and THE FIDELITY & DEPOSIT COMPANY OF BALTIMORE, MARYLAND,
Complainants and Appellants,

vs.

WILLIAM CULVER, LESTER A. TABER, THOMAS J. CAVANAUGH, FRANK McKEYES, Guardian of the Estate of William Culver and the SOUTH HAVEN & EASTERN RAILROAD COMPANY,
Defendants and Appellees.

Appeal from Circuit Court of the United States for the Western District of Michigan, Southern Division.

Appellants' Brief in Answer to Motion to Dismiss Appeal.

Whatever may be the final conclusion of this court as to whether the lower court had jurisdiction of this suit, we apprehend the motion to dismiss the appeal must be denied.

There is no pretense of any fault or irregularity in the taking of or perfecting the appeal. The question sought to be raised by the motion is the fundamental one as to whether the lower court had jurisdiction to entertain the bill.

It is so well settled that such a question will come up only upon the final hearing, and not upon a preliminary motion to dismiss the appeal, that we do not need to cite authorities here to the point.

It is true that by Subdivision 5 of Rule 6 where an appeal is manifestly taken for delay only it may be coupled with a motion to dismiss. But that is expressly provided to be in cases where "this court has jurisdiction."

Counsel interpret the word "jurisdiction" in the rule to mean the general jurisdiction of a Federal court to entertain the case; because, after citing the rule, they say (their Brief, page 16):

> "In the present case it clearly appears from an examination of the record that the court is without jurisdiction. The District Judge so found," etc.

If so, and if dismissal on motion is only where "this court *has* jurisdiction," and this court has *no* jurisdiction, it is clear the motion cannot prevail—under the rule with the interpretation of the word jurisdiction given it by counsel. In one breath they say the rule provides for dismissal in cases where "this court has jurisdiction" and in the next that this court has no jurisdiction.

According to their own interpretation of the rule, then, it brings us back in a circle to the proposition that it is on the final hearing only the sole question of jurisdiction presented can be considered.

But this appeal is not for delay, but *bona fide*.

The last clause in the subdivision of the rule would not apply either, because it cannot be said in any view that the question on which the jurisdiction depends in this case is "frivolous." In the case

quoted by appellees' counsel, *White* v. *Cook*, 99 U. S., 607, it is said that there "must be some color of right to a dismissal" before this subdivision of the rule will apply. As there are no colorable rights to a dismissal here, therefore the subdivision of the rule would not apply to this case.

To ascertain whether this court has jurisdiction, as it turns upon the question as to whether one of the parties is or is not indispensable to a determination of the controversy, as between the parties properly in the Federal Court it requires an examination of the whole case and the facts connected with it, as much as if the question here were on demurrer attacking the equity of the bill. In other words, the question presented is not determinable on consideration of any one point, but upon the whole record as completely as upon any final hearing of a case.

We apprehend, therefore, that all that is really necessary to say in this brief is included in the suggestions we have submitted up to this point; and that the court will not be interested at this stage of the case to examine further.

However, as bearing upon the proposition whether the questions involved in this case are "frivolous," if the court desires upon this motion to go somewhat into the case itself, we further submit the following:

This suit was brought by bill in chancery setting up, among other things, that formerly a judgment had been got by the defendant William Culver, a citizen of Michigan, against a Michigan corporation, the South Haven & Eastern Railroad Company, in Michigan, for a personal injury received by the said

Culver, the amount of the judgment being about $20,000.

An appeal was taken from this judgment to the Supreme Court of Michigan. Pending the appeal it was discovered the judgment had been got by fraud, and that but for such fraud no judgment could have been obtained.

It was also alleged *inter alia* that the railroad company was insolvent; that it had been merged with a trunk line, and that collection of the judgment from it could not be made.

It was also alleged that the complainant in this case, Steele, of Illinois, had sold the railroad in question, and as a part of said sale had entered into a bond that he would pay such judgment, if any, as might be obtained against the railroad company in the case of Culver. It was also alleged that the Maryland Company had become surety on the appeal bond in taking the case to the Supreme Court of Michigan, and that therefore Steele and the Maryland Surety Company were the *real parties* in interest and would have ultimately to pay the judgment if it should be collected. Judgment was taken against the Maryland Company on the appeal bond.

It is also alleged that Culver in the meantime has been adjudged an "incompetent" by the proper court in Michigan, and that the proceedings in his case for personal injuries and suit on the appeal bond have been conducted nevertheless, in his name ever since.

The prayer of the bill, in effect, is that Culver and his attorneys be enjoined from collecting the original judgment rendered by the Michigan State

Court, also the judgment rendered against the Maryland Company upon the appeal bond.

It will be seen by this short summary of the bill that whatever may be the technical status of the various parties the real parties in interest, which, we understand, are the ones who are always considered to be those to be protected in a court of equity, are Steele and the Maryland Surety Company, and that the railroad company has practically no interest in the controversy; first, because it is insolvent, and, second, because under his contract Steele will finally have to pay the judgment, if it should be collected.

We think, however, that the railroad company is not even formally or technically an "indispensable" party to this litigation. The company was originally made a defendant in the bill. Subsequently a motion was made to dismiss as to the railroad company, which the court below denied, on the ground that the railroad company was necessary or indispensable to the ultimate disposition of the case.

This is the only question presented by this appeal.

Let us admit at once that the court has the right to align the parties as complainant or defendant according to their real interest in the controversy.

Let us also admit at once that if the railroad company is an "indispensable" party, being of the same citizenship as the defendants in this suit, that the lower court had no jurisdiction to retain the bill.

This brings the question down to the solitary one: Was the railroad company an indispensable party?

It has been so frequently determined that parties for the purpose of Federal jurisdiction are divided

into "proper," "necessary" and "indispensable," and that while they may be "proper" parties, or, what at common law would be regarded as "necessary" parties, that that will not oust the jurisdiction of the Federal Court, but that where they are "indispensable" parties and of the same citizenship, that it will oust such jurisdiction, that it seems superfluous to cite authorities. But for the convenience of the court we refer to the following cases:

Sioux City Terminal, etc., Co. v. *Trust Co. of N. A.*, 82 Fed. Rep., 124. Principle clearly stated at page 126. By Judge Sanborn, Eighth Circuit.

Shields v. *Barrow*, 17 How., 130, at 139. A case that illustrates the principle clearly.

The division between a common-law "necessary" party and an "indispensable" party under the Federal rule is sometimes confused, and, with all due respect to the learned Circuit Court, we think the distinction has not been clearly kept in mind in this case.

At the threshold we desire to call special attention of the court to the fact that no attempt is made by this bill to affect in the slightest degree the proceedings in the State Court. The judgment of Culver against the railroad company is not sought to be affected. The remedy to which we are confined by the rule, well established in such a case as this, is that we can only have an injunction acting upon the parties *in personam* to prevent them from taking steps to collect the judgment, leaving the judgment, however, itself in full force.

No attempt is made by this bill to procure any in-

junction against the railroad company; in the prayer of the bill that company is specifically excepted. It is left free to act as it may see fit, without any regard to such injunction as may be had against Culver. If it shall at any time desire to pay this judgment it would have a perfect right to do so, notwithstanding any decree that may be rendered in this case. Indeed, the decree in the case might specifically provide that in case of the payment of the same by the railroad company, that Culver should have a right to receive it. The rule laid down in the cases is quite plain that where a decree can be made without affecting or controlling the rights of the person who cannot be made a party to the suit that it will be done, and it is only in those cases where the party not represented in the litigation is of very necessity controlled or affected inequitably or injuriously that the court will refuse to pass upon the legitimate and proper questions arising between the other parties to the litigation, who are entitled to come before the court.

It is manifest that if no injunction is had against the railroad company that its actions are not controlled or affected, and that it suffers no inequity, or injustice. It is left in exactly the same status that it was before, so far as *its* acts are concerned. It is true that Culver is not permitted to *force* collection of the judgment, but this acts on Culver, and not on the railroad company. It may be a moral conclusion that the railroad company will not pay the judgment if it is not obliged to, but that does not affect its legal or technical status toward the judgment. It is left free to act as it may see fit, and only Culver, who *is* represented in the suit, and

properly under the rules, is the one who is inhibited from acting.

Adoption of Rule 47 and the various decisions in the Federal Courts indicate quite clearly that it is the spirit of the Federal Courts to determine questions between parties who can properly be brought before it wherever it is possible to do so—it having been found that in many instances where the real parties to the controversy had a substantive right to appeal to the Federal Courts that they were prevented by some technical objection on account of the same citizenship of someone who, under the common-law rules, would have been considered a "necessary" party. This gave rise to the distinction made between "necessary" and "indispensable" parties, and we think that in the case at bar the necessity for such a distinction, its propriety, is made manifest, because Steele and the Maryland Company have a real substantial interest in this controversy; the railroad has absolutely none. It is a mere shell, and, so far as this case is concerned, without substance—not subject either to injury or benefit.

If the result of the decree were to coerce the railroad company and the result of the decree should compel that company to do or not to do a certain thing it might, perhaps, with more propriety be said that it was indispensable to a final determination of the questions involved. This, however, is not the case.

We have the situation, then:

First, that no attempt is made to procure any control of the actions of the railroad company.

Second, from the inherent situation arising from

the fact that the railroad company is insolvent, it cannot be made to pay the judgment.

That if it did pay the judgment Steele must repay the amount at once to the company. Indeed, must pay it in the first instance.

It seems to us, therefore, that it would be permitting technical and empty considerations to control against substantial and important rights practically presented by the record, for the court to refuse to hear the case for Steele and the Maryland Company.

The learned court below apparently gave some consideration to the fact that the railroad company might subsequently become solvent, and that, therefore, so far as the allegation of insolvency of the railroad company is concerned, that should not be considered. As opposed to this idea permit us to suggest that if the railroad company ever does become solvent and desires to pay this judgment there will be nothing in the decree asked for by the bill which would prevent it doing so. And, as we have suggested in another connection, the decree under the bill as drawn and presented in this case could specifically provide that if at any time the railroad company should become solvent and should pay or desire to pay this judgment, that Culver or his attorneys might be permitted to receive the money. The court will see, however, that if Culver should be left in such a position that he could compel payment by the railroad company, still would Steele ultimately be liable, and the insolvent railroad company, protected by the contract with Steele, would be little else than a conduit through which the money would pass from Steele to Culver; showing quite

plainly that, after all, Steele is the real party in interest that should be protected by the court in equity, and that at most the railroad company, in any event, can have no interest in this question excepting merely a formal and perfunctory one.

We think, therefore, that it is within the spirit of the 47th Rule and of the decisions of this court that Steele and the Maryland Surety Company's substantial rights should not be ousted from the consideration of this court, in a court of equity, by the mere formal, the empty, and, at the very most, purely technical relation of the railroad company to the controversy. And more determinately so, when no attempt is made to control the action of that company, or to affect the judgment against it.

Further: Liability of the railroad company is upon the original judgment. The liability of the Maryland Company is on an undertaking into which it had entered for the payment of the judgment under certain conditions. And the liability of the complainant Steele is on undertakings entirely collateral which will eventually require him to make good the amount of the judgment, if it shall have to be paid.

Their interests are, therefore, so far separable that a separate suit would be required to make either the Maryland Company or Steele liable. And there might arise many conditions that would release the Maryland Company or Steele that would not affect the liability of the railroad company. Are they not, then, so far separable as to come within the principle exemplified by Rule 47?

In practical effect and as a reality, the railroad

company is not affected even remotely—certainly not injuriously.

No one, then, would be wronged by such a decree as the one sought by the bill.

But the bill also contains the allegation that judgment was rendered against the Maryland Surety Company on the appeal bond. If the judgment on which the bond is based is fraudulent a court of equity would carry forward the infirmity to the bond and the judgment upon it, and prevent it being collected.

The railroad company is not a party to that judgment. The allegation of the bill is that judgment was got against the Maryland Surety Company, and that Steele stands back of that company. To enjoin the collection of this judgment, therefore, would not involve the railroad company at all—even technically, or formally.

The railroad company is not, then, an indispensable party to the injunction to prevent the collection of *that* judgment to which it is not a party. And for that purpose, if for no other, the bill should be retained by the court, and that disposes of the question of jurisdiction; for, of course, the question before this court is not whether all the remedy prayed can be granted without the presence of the railroad company, but whether there is any that can be.

Another question will not improbably arise on this bill. There is an allegation in the bill that in the midst of these proceedings Culver was adjudged an "incompetent" by action of a Probate Court in Michigan. We are not prepared yet, and on this motion, to say just what effect that might have upon

the subsequent proceedings, and especially on the suit upon the appeal bond brought and conducted to judgment in Culver's name, and not in the name of his appointed guardian. Whether a judgment of that kind should be collected in favor of one under guardianship is, perhaps, a question of some seriousness. It may be that if the Maryland Surety Company should pay such a judgment to Culver it would not be a protection of the surety company against his guardian. At any rate, it is one of the questions in the case which the court will have to pass upon eventually, and is an additional reason for saying (and that is as far as we are prepared to go at the present time on this particular point) that the questions arising in this case should be left to be determined upon an ultimate hearing, and not upon a motion of this kind.

The motion to dismiss the appeal is entirely inadequate to raise the questions involved in the case.

Nor is this appeal frivolous or for delay, but we submit it appears, *prima facie* at least, that the lower court had full jurisdiction to pass upon the case.

The authorities cited by defendant's counsel, especially the cases of *Groel* v. *United Electric Co.*, 132 Fed. Rep., 252, and *McClellan* v. *McKane*, 154 Fed. Rep., 164 (Defendant's Brief, 14), illustrate the point which we desire to make in this case as well, possibly, as any that we could find.

In cases where on account of the dereliction in their trust of officers or directors of a corporation, or in cases where the trustees or officers are about to do an unlawful act, but they being in the majority and control of the company they will not induce the

corporation itself to bring suit against themselves, a stockholder has a right to bring an action in the stead and place of the corporation itself. The form of decree in such cases is usually that the *corporation* will cover the amount, which is paid into the treasury of the company for the general benefit and purposes of the corporation.

For instance, suppose an officer of a company had unlawfully and fraudulently charged an excessive salary. The corporation refusing to proceed, a stockholder sues to recover it back. This would go to the corporation at large and the corporation would be the real complainant. Of course, in such a case a decree cannot be made except directly involving the rights and interests of the corporation, and the corporation is therefore an indispensable party. Such are both the cases referred to.

We can imagine a case that might arise between a stockholder of a corporation and an officer affecting nobody's rights except those of the stockholder himself and the officer, and in which the corporation would have no real interest or concern. We imagine that in such a case the citizenship of the corporation would be wholly immaterial to the jurisdiction of the court.

We have been struck with the fact that the only cases to support defendants in their contention have belonged to this particular class where stockholders have brought suit involving the direct rights of the corporation which they represent, and in the place of which they stand in the litigation. The principles we have stated are well set out in the other case cited by counsel (page 14), *Dodge* v. *Wolsey,* 18 How., 340. A leading case upon that

subject is *Hawes* v. *City of Oakland*, 101 U. S., 450. (Defendants' Brief, 15.)

The difference between a case where the decree must necessarily run to the corporation, that is to say, where the corporation must recover the amount, if any, in the suit, and a case like the one at bar, in which personal injunctions are attempted to be had, but in which none whatever is sought against the corporation itself or its actions attempted to be controlled, is quite clear.

One element evidently considered by the lower court and which we find has also crept a little into the consideration of some of the reported cases is the possibility that the rights existing between the omitted party and the party opposed may have to be litigated in the future. That is to say, that the controversy in the Federal Court will not be conclusive upon the party omitted.

It is to be conceded that at common law all the parties necessary to a complete determination of the controversy should be brought before the court, but even this was not in all cases required. We do not understand, however, that this principle is to be taken into account to determine the question of jurisdiction of the Federal Court. We understand that the Federal Court will settle the controversy so far as it can between the parties before it, providing it does no inequity to the parties who cannot be brought before it, but that the common-law principle of the necessity of requiring the whole controversy to be settled in one suit is not applied to the jurisdictional question. The fact, therefore, that Culver and the railroad company might contingently be required to litigate this matter between

themselves in the State Court at some future time (the probability of which, in view of the insolvency of the railroad company, is, perhaps, distant) ought not to oust the jurisdiction of the Federal Court and determine the questions between the parties properly before that court. And if this consideration had not been present in the mind of the lower court it seems not improbable that his conclusions might have been the reverse of what they were. In other words, with all due respect to the lower court, it seems to us that he has confused a common-law principle with the jurisdictional question herewith presented, in which, however, an excuse may be found, as we find the same want of differentiation existing in some of the cases.

The lower court also suggested that, as to the point that the railroad company is insolvent, that company might in the future become solvent again.

We apprehend the courts should administer the rights of these parties as they are today, and not as they might by a possible chance become at some indeterminate time in the future.

But if the company should become solvent, Steele still stands back of the liability, and the railroad company would be, as we have said, without any *real* interest in the result—a mere conduit through which the money would pass from Steele to Culver.

At any rate, the decree in the case could provide (being only an injunction) for any change of condition that might arise in the future.

We do not want it understood that we admit defendant's attitude if the railroad company were ever so solvent.

In any possible view, we respectfully submit the motion to dismiss the appeal should be overruled.

STEELE *v.* CULVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 393. Submitted June 1, 1908.—Decided October 26, 1908.

Where jurisdiction of the Circuit Court depends on diversity of citizenship, the parties may be rearranged according to their real interests.

Where a party defendant should be aligned as a party plaintiff, is a necessary party, and is a citizen of the State of which the other defendants are citizens, the Circuit Court has not jurisdiction.

In order to confer jurisdiction on the Circuit Court, one who is a necessary party cannot be omitted merely on account of his insolvency.

A judgment against a surety cannot be impeached so long as the judgment against the principal on which it is based stands, and in a suit brought by the surety to set both judgments aside, the principal is a necessary party plaintiff.

THE facts are stated in the opinion.

Mr. Thomas J. Cavanaugh and *Mr. L. A. Tabor*, for appellees, in support of motion to dismiss or affirm:

The defendant railroad company should be the complainant in the case—in fact it is the party naturally burdened with the responsibility of applying for relief. It is not made a complainant in express terms, nor is any reason set forth in the bill why it was not made the sole complainant or at least one of the complainants. There is no reason assigned why it is made a defendant. No relief is asked against it. In fact, relief is asked for it. Therefore while it appears as a defendant, in reality it is a complainant, and there is no diversity of citizenship and no jurisdiction to entertain the bill. *Doctor* v. *Harrington*, 196 U. S. 579; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. See also *Groel* v. *United Electric Co. of N. J.*, 132 Fed.

Rep. 252; *McClellan* v. *Kane*, 154 Fed. Rep. 164; *Dodge* v. *Wolsey*, 18 How. 340.

In this case the railroad company is a necessary party and it, like the other defendants, is a resident of Michigan. While it is made a defendant the court will look beyond the pleadings and arrange the parties according to their sides in the dispute, *Dawson* v. *Trust Co.*, *supra*, and when that is done the railroad company is on the complainant's side. The fraud alleged in the bill of complaint is said to have been committed against it and not against any of the complainants. Its interests are not antagonistic to the complainants. In fact the complainants and the defendant railroad company are friends. No difference or collision of interests or action is alleged or even suggested and relief is asked in behalf of the defendant railroad company. It would seem, then, that the arrangement of the parties in this bill is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist and the device ought not to be allowed to succeed.

It is the corporation as a corporation which has to determine whether it will make anything that is a wrong to the corporation a subject-matter of litigation or whether it will take steps to prevent the wrong from being done. *Hawes* v. *Oakland*, 104 U. S. 450; *Corbus* v. *Alaska Mining Co.*, 187 U. S. 455.

Until it refuses to redress the wrong no person incidentally or otherwise injured or benefited, not even a stockholder, can maintain a suit.

In the present case the railroad company is very deeply interested in the litigation. If the judgment is set aside or enjoined it is benefited to that extent. It is a citizen of Michigan.

It can proceed in its own behalf now or if it refuses to act an interested stockholder might act for it in the state courts.

Mr. Edward Maher, *Mr. W. J. Barnard* and *Mr. Ernest Dale Owen*, for appellants, opposing the motion to dismiss or affirm:

The question sought to be raised by the motion is the fundamental one as to whether the lower court had jurisdiction to

entertain the bill. Such a question will come up only upon the final hearing.

Admitting that the court has the right to align the parties as complainant or defendant according to their real interest in the controversy and that if the railroad company is an indispensable party, being of the same citizenship as the defendants in this suit, the lower court had no jurisdiction to retain the bill, we maintain that the railroad was *not* an indispensable party.

If the result of the decree were to coerce the railroad company and the result of the decree should compel that company to do or not to do a certain thing it might, perhaps, with more propriety be said that it was indispensable to a final determination of the questions involved. This, however, is not the case.

We have the situation, then:

First, that no attempt is made to procure any control of the actions of the railroad company.

Second, from the inherent situation arising from the fact that the railroad company is insolvent, it cannot be made to pay the judgment.

That if it did pay the judgment Steele must repay the amount at once to the company. Indeed, must pay it in the first instance.

It would be permitting technical and empty considerations to control against substantial and important rights practically presented by the record, for the court to refuse to hear the case for Steele and the Maryland Company.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to prohibit the collection of a judgment rendered by a Michigan state court against a railroad company, and also of a judgment against the plaintiff corporation upon a bond given by it as surety when the railroad took the case to the Supreme Court of the State. See *Culver* v. *South*

Haven & Eastern R. R. Co., 144 Michigan, 254; *Culver* v. *Fidelity & Deposit Co.*, 149 Michigan, 630. The ground is that the original judgment was got by fraud. The plaintiff Steele had contracted with the surety company and also with purchasers of the railroad to pay the judgment against the latter if recovered, and joins as plaintiff on the footing that he is the real party in interest. The railroad company is made a defendant, but it is a Michigan corporation, and, as the other defendants are citizens and residents of Michigan, if it should be aligned with the plaintiffs the necessary diversity of citizenship would not exist. The Circuit Court dismissed the bill on demurrer for want of jurisdiction and allowed an appeal with a certificate that the want of the requisite diversity of citizenship and consequently of jurisdiction was the sole ground of the decree. The case is before us upon a motion to dismiss or affirm.

The appellants candidly admit that for a decision upon jurisdiction the parties may be arranged according to their real interests and that if the railroad company is an indispensable party the decision below was right. But they urge that it is alleged that the railroad is insolvent, that no relief is asked against it, but it is left free to pay the judgment if it desires to and can, and that the real parties in interest are the plaintiffs, and especially Steele, upon whom, it is said, the burden ultimately must fall. These arguments do not seem to us to need an extended answer. With regard to the alleged insolvency it is a strange proposition that a defendant is not an indispensable party to an attempt to stop the collection of a judgment against him because at the moment his property is not sufficient to pay his debts. The railroad was sole master of the litigation against itself and we must assume is coöperating with the plaintiff in the present case. It seems to us equally strange to suggest that a contract of a stranger with a stranger can affect the interest of the party immediately concerned. The omission of any prayer for relief against the railroad simply shows that properly it is to be treated as a plaintiff in this case. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180, 181.

It is suggested that the controversy as to the judgment against the Security Company is separable, and that relief may be given against that at least without the presence of the railroad. But the only ground on which that judgment is complained of is that that against the railroad, upon which it is based, was obtained by perjury and fraud. So long as the judgment against the railroad stands, that against its surety cannot be impeached. By its bond the surety undertook to pay the judgment, if rendered, against its principal, whether right or wrong. If the principal remains liable under that judgment the surety is bound to pay. *Krall* v. *Libbey*, 53 Wisconsin, 292; *Piercy* v. *Piercy*, 1 Iredell Eq. 214, 218. But the principal cannot be relieved by a proceeding behind its back.

There is a further allegation in the bill that, pending the proceeding, Culver, the plaintiff in the original suits, was adjudged a spendthrift, and that a guardian was appointed but was not substituted for Culver in these suits. A hope is expressed that if the case proceed to oral argument some reason may occur for attributing more importance to these facts than is disclosed at present. But that is an illusion. The bill, as we have said, is founded solely on allegations of fraud in getting the first judgment, and must be maintained upon them if upon any. The railroad company is an indispensable party if that issue is to be tried. It is unnecessary to consider other objections to the suit.

This court has jurisdiction to declare the Circuit Court's denial of its own jurisdiction correct. But we regard the decision of the Circuit Court as so plainly right that the appeal should be dismissed as frivolous.

Appeal dismissed.